PART 5 FINAL INSTRUCTIONS: DEFENSES AND THEORIES OF DEFENSE

5.01 Alibi

[Updated: 6/14/02]

One of the issues in this case is whether [defendant] was present at the time and place of the alleged crime. If, after considering all the evidence, you have a reasonable doubt that [defendant] was present, then you must find [defendant] not guilty.

Comment

A defendant is entitled to a special instruction that on the issue of alibi a reasonable doubt is sufficient to acquit. See, e.g., Duckett v. Godinez, 67 F.3d 734, 745 (9th Cir. 1995); United States v. Simon, 995 F.2d 1236, 1243 (3d Cir. 1993); United States v. Hicks, 748 F.2d 854, 858 (4th Cir. 1984); United States v. Burse, 531 F.2d 1151, 1153 (2d Cir. 1976); United States v. Megna, 450 F.2d 511, 513 (5th Cir. 1971).

5.02 Mental State That Is Inconsistent with the Requisite Culpable State of Mind

[Updated: 6/14/02]

Evidence has been presented of [defendant]'s [carelessness; negligence; ignorance; mistake; good faith; abnormal mental condition; etc.]. Such [_____] may be inconsistent with [the requisite culpable state of mind]. If after considering the evidence of [_____], together with all the other evidence, you have a reasonable doubt that [defendant] acted [requisite culpable state of mind], then you must find [defendant] not guilty.

Comment

(1) This instruction may be given whenever the evidence of defendant's mental state, if believed, would tend to raise a reasonable doubt about the requisite culpable state of mind. See United States v. Batista, 834 F.2d 1, 6 (1st Cir. 1987) (approving an instruction that "the jury . . . consider the statements and acts of appellant or any other circumstance in determining his state of mind, and to make sure that they were convinced beyond a reasonable doubt that appellant acted willfully and knowingly"); cf. United States v. Sturm, 870 F.2d 769, 777 (1st Cir. 1989) ("Jury instructions that allow a conviction even though the jury may not have found that the defendant possessed the mental state required for the crime constitute plain error."). However, this instruction is a reinforcement of—not a substitute for—language instructing the jury on the exact mental state required for conviction under the relevant statute.

(2) A defendant's abnormal mental condition, just like ignorance, mistake or intoxication, may raise a reasonable doubt that the defendant acted with the requisite culpable state of mind. As the Court of Appeals for the First Circuit held in United States v. Schneider, 111 F.3d 197, 201 (1st Cir. 1997), "in principle there should be no bar to medical evidence that a defendant, although not insane, lacked the requisite state of mind." In practice, the trial judge must screen such evidence for relevance, potential for confusion, reliability and helpfulness. Id.

(3) For a discussion of the "tax-crime exception" to the general proposition that ignorance of the law is no defense, see United States v. Aversa, 984 F.2d 493, 500-01 (1st Cir. 1993), vacated and remanded on other grounds, 510 U.S. 1069 (1994) (citing Cheek v. United States, 498 U.S. 192, 199-201 (1991)).

5.03 Intoxication

[Updated: 6/14/02]

You have heard evidence that [defendant] was intoxicated. "Intoxicated" means being under the influence of alcohol or drugs or both. Some degrees of intoxication may prevent a person from having [the requisite culpable state of mind]. If after considering the evidence of intoxication, together with all the other evidence, you have a reasonable doubt that [defendant] had [the requisite culpable state of mind], then you must find [defendant] not guilty.

Comment

"Voluntary" intoxication may rebut proof of intent in a "specific intent" but not a "general intent" crime. United States v. Sewell, 252 F.3d 647, 650-51 (2d Cir. 2001); United States v. Oakie, 12 F.3d 1436, 1442 (8th Cir. 1993). The burden of proof to support the necessary intent, however, remains with the government. United States v. Burns, 15 F.3d 211, 218 (1st Cir. 1994). In Burns, the court declined to rule on whether intoxication is a diminished capacity defense barred by the Insanity Reform Act of 1984, 18 U.S.C. § 17. 15 F.3d at 218 n.4.

5.04 Self-Defense

[Updated: 6/14/02]

Evidence has been presented that [defendant] acted in self-defense. Use of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force. However, a person must use no more force than appears reasonably necessary in the circumstances.

The government has the burden of proving that [defendant] did not act in self-defense.

Comment

(1) The instruction is modeled on Sixth Circuit Instruction 6.06. A defendant is entitled to a self-defense instruction if he or she produces sufficient evidence "to require the consideration of a reasonable doubt as to the justification for the homicide." DeGroot v. United States, 78 F.2d 244, 251 (9th Cir. 1935); see also United States v. Morton, 999 F.2d 435, 437 (9th Cir. 1993).

(2) This model instruction is quoted with apparent approval in United States v. Bello, 194 F.3d 18, 26 (1st Cir. 1999).

5.05 Duress

[Updated: 6/14/02]

Evidence has been presented that [defendant] was threatened by [_____] with serious bodily injury or death.

[Defendant] cannot be found guilty if [defendant] participated in the [describe offense] only because [defendant]: (1) acted under an immediate threat of serious bodily injury or death; (2) had a well-grounded belief that the threat would be carried out; and (3) had no reasonable opportunity to escape or otherwise frustrate the threat.

On this issue, just as on all others, the burden is on the government to prove the defendant's guilt beyond a reasonable doubt. For you to find [defendant] guilty, therefore, you must be convinced that the government has proven beyond a reasonable doubt not only that [defendant] participated in the [describe offense] but also any of the following three things:

> One, that no such threat occurred or it was not immediate; OR
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> Two, that [defendant] had a reasonable opportunity to escape or otherwise frustrate the threat but did not exercise it; OR
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> Three, that [defendant] did not have a well-grounded belief that the threat would be carried out.

Comment

Before this defense can go to the jury, the court must determine that the defendant has met the entry-level burden of producing enough evidence to support the three elements for a finding of duress. United States v. Arthurs, 73 F.3d 444, 448 (1st Cir. 1996); United States v. Amparo, 961 F.2d 288, 291 (1st Cir. 1992). This is only a burden of production, not persuasion. The burden of persuasion remains with the government if the charged crime requires *mens rea*. Amparo, 961 F.2d at 291; see also United States v. Bailey, 444 U.S. 394, 415-16 (1980); United States v. Ciambrone, 601 F.2d 616, 626-27 (2d Cir. 1979); Model Penal Code § 2.09. But although First Circuit law is still unsettled, it seems likely that in a case where *mens rea* is not required—for example, possession of a firearm by a felon—the burden of proof will shift to the defendant. See United States v. Diaz, 285 F.3d 92, 95-97 (1st Cir. 2002) (citing approvingly United States v. Dodd, 225 F.3d 340, 343-50 (3d Cir. 2000) and United States v. Deleveaux, 205 F.3d 1292, 1298-1301 (11th Cir. 2000)).

5.06 Necessity

[Updated: 6/14/02]

Evidence has been presented that [defendant] acted out of necessity.

[Defendant] cannot be found guilty if [he/she] participated in the [describe offense] only out of necessity. A person acts out of necessity if he or she acted because he or she: (1) was faced with a choice of evils and he or she chose the lesser evil; (2) acted to prevent imminent harm; (3) had a reasonable belief that his or her actions would directly cause the harm to be avoided; and (4) had no legal alternative but to violate the law.

On this issue, just as on all others, the burden is on the government to prove [defendant]'s guilt beyond a reasonable doubt. For you to find [defendant] guilty, therefore, you must be convinced that the government has proven beyond a reasonable doubt not only that [defendant] participated in the [describe offense], but also any of the following four things:

One, that no choice of evils existed or that [defendant] did not choose the lesser evil; OR

Two, that there was no imminent harm, or that [defendant] did not act to prevent it; OR

Three, that [defendant] did not reasonably believe that [his/her] acts would directly cause the harm to be avoided; OR

Four, that [defendant] had an alternative other than to violate the law.

"Imminent harm" means an emergency or a crisis involving immediate danger to oneself or another.

Comment

(1) Before this defense can go to the jury, the court must determine that the defendant has met the "entry-level burden" of producing enough evidence to support the defense's four elements. United States v. Ayala, 289 F.3d 16, 26 (1st Cir. 2002); United States v. Maxwell, 254 F.3d 21, 26 (1st Cir. 2001); see also United States v. Sued-Jimenez, 275 F.3d 1, 6 (1st Cir. 2001). As with the defense of duress, the entry-level burden is apparently a burden of production. United States v. Bailey, 444 U.S. 394, 415 (1980); cf. United States v. Amparo, 961 F.2d 288, 291 (1st Cir. 1992) (describing the burden of production necessary to support the defense of duress). The burden of persuasion remains with the government, at least if the charged crime requires *mens rea*. Cf. United States v. Duclos, 214 F.3d 27, 33 (1st Cir. 2000) (assuming without deciding that the government bore the burden of proving the non-existence of the defendant's necessity defense); Amparo, 961 F.2d at 291 (duress).

5.07 Entrapment

[Updated: 6/14/02]

[Defendant] maintains that [he/she] was entrapped. A person is "entrapped" when he or she is induced or persuaded by law enforcement officers or their agents to commit a crime that he or she was not otherwise ready and willing to commit. The law forbids his or her conviction in such a case. However, law enforcement agents are permitted to use a variety of methods to afford an opportunity to a defendant to commit an offense, including the use of undercover agents, furnishing of funds for the purchase of controlled substances, the use of informers and the adoption of false identities.

For you to find [defendant] guilty of the crime with which [he/she] is charged, you must be convinced that the government has proven beyond a reasonable doubt that [defendant] was not entrapped. To show that [defendant] was not entrapped, the government must establish beyond a reasonable doubt one of the following two things:

> One, that [the officer] did not persuade or talk [defendant] into committing the crime. Simply giving someone an opportunity to commit a crime is not the same as persuading [him/her], but persuasion, false statements or excessive pressure by [the officer] or an undue appeal to sympathy can be improper; OR
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> Two, that [defendant] was ready and willing to commit the crime without any persuasion from [the officer] or any other government agent. You may consider such factors as: (a) the character or reputation of the defendant; (b) whether the initial suggestion of criminal activity was made by the government; (c) whether the defendant was engaged in the criminal activity for profit; (d) whether the defendant showed reluctance to commit the offense, and whether that reluctance reflects the conscience of an innocent person or merely the caution of a criminal; (e) the nature of the persuasion offered by the government; and (f) how long the government persuasion lasted. In that connection, you have heard testimony about actions by [defendant] for which [he/she] is not on trial. You are the sole judges of whether to believe such testimony. If you decide to believe such evidence, I caution you that you may consider it only for the limited purpose of determining whether it tends to show [defendant]'s willingness to commit the charged crime or crimes without the persuasion of a government agent. You must not consider it for any other purpose. You must not, for instance, convict [defendant] because you believe that [he/she] is guilty of other improper conduct for which [he/she] has not been charged in this case.

Comment

(1) "A criminal defendant is entitled to an instruction on his theory of defense so long as the theory is a valid one and there is evidence in the record to support it. In making this determination, the district court is not allowed to weigh the evidence, make credibility determinations, or resolve conflicts in the proof. Rather, the court's function is to examine the evidence on the record and to draw those inferences as can reasonably be drawn therefrom, determining whether the proof, taken in the light most favorable to the defense can *plausibly* support the theory of the defense. This is not a very high standard to meet, for in its present content, to be 'plausible' is to be 'superficially

reasonable.'" United States v. Gamache, 156 F.3d 1, 9 (1st Cir. 1998) (citations omitted). This seems to be a lower hurdle than previously required, that "[t]he record must show 'hard evidence,' which if believed by a rational juror, 'would suffice to create a reasonable doubt as to whether government actors induced the defendant to perform a criminal act that he was not predisposed to commit.'" United States v. Young, 78 F.3d 758, 760 (1st Cir. 1996) (quoting United States v. Rodriguez, 858 F.2d 809, 814 (1st Cir. 1988)).

(2) The instruction is consistent with recent First Circuit caselaw. See, e.g., United States v. LeFreniere, 236 F.3d 41, 44-45 (1st Cir. 2001); Gamache, 156 F.3d at 9-12; United States v. Montañez, 105 F.3d 36, 38 (1st Cir. 1997); United States v. Acosta, 67 F.3d 334, 337-40 (1st Cir. 1995); United States v. Gendron, 18 F.3d 955, 960-64 (1st Cir. 1994); United States v. Gifford, 17 F.3d 462, 467-70 (1st Cir. 1994); United States v. Hernandez, 995 F.2d 307, 313 (1st Cir. 1993); United States v. Reed, 977 F.2d 14, 18 (1st Cir. 1992); see also United States v. Pion, 25 F.3d 18, 20 (1st Cir. 1994). We have intentionally avoided using the word "predisposition," a term that has proven troublesome to some jurors. See, e.g., United States v. Rogers, 121 F.3d 12, 17 (1st Cir. 1997).

(3) It may be necessary to conform the charge to the defendant's theory of defense:

> Of course, the district court has a great deal of latitude in formulating a charge. But taken as a whole, the examples given were *all* either coercion examples or involved abstractions ("dogged insistence") rather far from the examples of inducement by an undue appeal to sympathy, which the defendant expressly requested and which were more pertinent to his defense. By omitting any "sympathy" examples, the trial court may well have left the jury with the mistaken impression that coercion is a necessary element of entrapment and, in this case, such a misunderstanding could well have affected the outcome.

Montañez, 105 F.2d at 39; see also United States v. Terry, 240 F.3d 65, 70 (1st Cir. 2001); Gamache, 156 F.3d at 9-11.

(4) "[T]he government cannot prove predisposition if the defendant's willingness to commit the crime was itself manufactured by the government in the course of dealing with the defendant before he committed the crime charged." United States v. Alzate, 70 F.3d 199, 201 (1st Cir. 1995) (citing Jacobson v. United States, 503 U.S. 540, 549 & n.2 (1992)). If that is the issue, a more precise instruction is advisable. See id. But, although the predisposition must exist before the contact with government agents, behavior after the contact can be used as evidence of the pre-existing predisposition. Rogers, 127 F.3d at 15.

(5) There is a separate defense known as entrapment by estoppel:

> Entrapment by estoppel requires [defendant] to establish: (1) that a government official told him the act was legal; (2) that he relied on the advice; (3) that the reliance was reasonable; (4) that, given the reliance, prosecution would be unfair.

United States v. Ellis, 168 F.3d 558, 561 (1st Cir. 1999); accord United States v. Bunnell, 280 F.3d 46, 49-50 (1st Cir. 2002).

(6) No case has yet decided that the judicial doctrine of sentencing entrapment or manipulation, see, e.g., United States v. Woods, 210 F.3d 70, 75 (1st Cir. 2000); United States v. Montoya, 62 F.3d 1, 3-5 (1st Cir. 1995), should be considered by the jury even though, after Apprendi, juries are called upon to make findings that affect minimum and maximum sentences.

5.08 Insanity [18 U.S.C. § 17]

[Updated: 6/14/02]

If you find that the government has proven beyond a reasonable doubt all the elements of the crime, you must then determine whether [defendant] has proven by clear and convincing evidence that [he/she] was legally insane at the time. For you to find [defendant] not guilty only by reason of insanity, you must be convinced that [defendant] has proven each of these things by clear and convincing evidence:

> First, that at the time of the crime [defendant] suffered from severe mental disease or defect; and
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> Second, that the mental disease or defect prevented [him/her] from understanding the nature and quality or wrongfulness of [his/her] conduct.

Clear and convincing evidence is evidence that makes it highly probable that [defendant] had a severe mental disease or defect that prevented [him/her] from understanding the nature and quality of wrongfulness of [his/her] conduct.

You may consider evidence of [defendant]'s mental condition before or after the crime to decide whether [he/she] was insane at the time of the crime. Insanity may be temporary or extended.

In making your decision, you may consider not only the statements and opinions of the psychiatric experts who have testified but also all of the other evidence. You are not bound by the statements or opinions of any witness but may accept or reject any testimony as you see fit.

You will have a jury verdict form in the jury room on which to record your verdict. You have three choices. You may find [defendant] not guilty, guilty, or not guilty only by reason of insanity. If you find that the government has not proven all the elements of the crime beyond a reasonable doubt, you will find [defendant] *not guilty*. If you find that the government has proven all the elements of the crime beyond a reasonable doubt and that [defendant] has proven by clear and convincing evidence that [he/she] was legally insane at the time of the crime, you will find [him/her] *not guilty only by reason of insanity*. If you find that the government has proven all the elements of the crime beyond a reasonable doubt and that [defendant] has not proven by clear and convincing evidence that [he/she] was legally insane at the time of the crime, you will find [him/her] *guilty*.

Comment

(1) The constitutionality of placing the burden on the defendant to prove insanity is settled. See United States v. Pryor, 960 F.2d 1, 3 (1st Cir. 1992) (citing Leland v. Oregon, 343 U.S. 790 (1952) and Rivera v. Delaware, 429 U.S. 877 (1976)).

(2) A trial judge is not required to instruct a jury on the consequences of a verdict of not guilty by reason of insanity, United States v. Tracy, 36 F.3d 187, 196 (1st Cir. 1994), except "under certain limited circumstances," such as when a prosecutor or witness has said before the jury that the defendant will "go free." Shannon v. United States, 512 U.S. 573, 587 (1994); see also Tracy, 36 F.3d at 196 n.8.

(3) The phrase "nature and quality [of defendant's conduct]" can be troublesome. It is not apparent what difference, if any, there is between the words "nature" and "quality." But given the lineage of the phrase to at least M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843), and its presence in the governing statute, 18 U.S.C. § 17, the safer course would be not to truncate the phrase.

A more troublesome issue arises when the defendant raises both the insanity defense and a mens rea defense based on abnormal mental condition. If evidence tends to show that a defendant failed to understand the "nature and quality" of his or her conduct, that evidence will not only tend to help prove an insanity defense but it will also typically tend to raise reasonable doubt about the requisite culpable state of mind. See Instruction 5.02. In Martin v. Ohio, 480 U.S. 228, 234 (1987), the Supreme Court held that the trial judge must adequately convey to the jury that evidence supporting an affirmative defense may also be considered, where relevant, to raise reasonable doubt as to the requisite state of mind. This "overlap" problem may be solved by adequate instructions. Id. But the "overlap" problem may be *avoided* by omitting the "nature and quality" phrase from the insanity instruction unless the defendant wants it.